

TRINH (Migration) [2018] AATA 2450 (20 June 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms HOANG ANH THU TRINH

VISA APPLICANT: Mr VAN TRI LE

CASE NUMBER: 1622575

DIBP REFERENCE(S): OSF2015071794

MEMBER: Russell Matheson

DATE: 20 June 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.

Statement made on 20 June 2018 at 8:35am

CATCHWORDS

Migration – Partner (Provisional) (Class UF) – Subclass 309 (Partner Provisional)) visa – Genuine relationship – Child of the relationship – Resides with the applicant – Joint commitment to care and support the child – Finances – Joint assets in Vietnam – Shared living expenses when together – Nature of the household – Parties live in different countries – Social aspects –Photography evidence – Statements from friends – Stable continuing relationship – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359AA

Migration Regulations 1994 (Cth), rr 1.15A Schedule2 cls 309.211, 309.212, 309.213, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 December 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant (the applicant) is a 30 year old male national of Vietnam. He applied for the visa on 6 January 2016 on the basis of his relationship with, the review applicant (the sponsor). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevant to this matter the primary criteria include cl.309.211(2).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the applicant was the spouse of the sponsor. The sponsor seeks review of the delegate's decision.
4. The review applicant appeared before the Tribunal on 14 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant.
5. The review applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. Background

8. The applicant is a 40 year old male from Hai Phong province in Vietnam. He declares that he divorced his first wife 2003. There are two children from this relationship that live in Australia. The applicant has a child with the sponsor.
9. The sponsor is an Australian citizen who lives in New South Wales. She declares that she divorced her husband in March 2015. There is one child from this relationship.
10. The applicant migrated to Australia on a partner visa (subclass 309) sponsored by his ex-wife in 2000. In August 2004, the applicant was refused a permanent visa due to his relationship breakdown with his ex-wife. In November 2005, the Migration Review Tribunal affirmed the refusal of the applicant's visa.
11. In 2006, the sponsor travelled to Australia on a student visa. It is claimed that the parties first met each other in Sydney in 2008 while the applicant came to pick up the sponsor and the sponsor's friend. The parties claimed they maintained contact and their friendship since then.
12. In 2011, the sponsor married her ex-husband and was sponsored on a Partner visa (subclass 820) by her ex-husband. On 13 December 2011, the sponsor delivered a child named Roydy Quee with her ex-husband.

13. It is claimed that the applicant and the sponsor had a one-night stand in February 2013. On 7 October 2013, the sponsor delivered a child named Tiffany Le. Two days later, the sponsor was granted a permanent visa on 9 October 2013, without notification to the Migration Office about her child Tiffany.
14. On 11 March 2014, the sponsor registered a birth certificate for the child, Tiffany Le, which lists the applicant as the father.
15. It is claimed that the parties and two children of the sponsor moved in together in April 2014. On 1 March 2015, the sponsor finalised her divorce with her ex-husband.
16. On 18 October 2015, the applicant and the sponsor held a wedding and had their marriage certificate issued.
17. On 20 December 2015, the applicant and the sponsor's first child Roydy Qee returned to Vietnam. On 30 December 2015, this application was lodged.
18. On 15 March 2016, the sponsor travelled to Vietnam. It is claimed that the parties spent time together on this trip. On 15 April 2016, the sponsor returned to Australia.
19. The sponsor travelled again to Vietnam on 27 September 2016 and returned to Australia on 17 October 2016.
20. The sponsor and her child Tiffany travelled to Vietnam from 11 January 2017 to 11 July 2017 staying at the applicants address in Hai Phong province. The sponsor provided as evidence a copy of a temporary residence certificate of her stay in Vietnam.
21. The Tribunal invited the applicant and the sponsor to undertake a DNA test to determine if the parties were the biological parents of the child Tiffany Le. The DNA test confirmed the applicant and the sponsor as the birth parents of Tiffany Le.

CONSIDERATION OF CLAIMS AND EVIDENCE.

22. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act
23. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor (review applicant) to the Tribunal.
24. The evidence the parties and witnesses provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

25. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
26. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together,

or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

27. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate indicating that the parties were married on 18 October 2015 at Cabramatta, New South Wales. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
28. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
29. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the sponsor and the applicant overall to be credible. Although there were some inconsistencies in evidence given by the parties, these inconsistencies were addressed in accordance with s.359AA with the sponsor and the Tribunal considered the responses from the sponsor plausible and considered them of a minor nature.
30. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the explanations offered are plausible.

Are the other requirements for a spousal relationship met?

31. *Financial aspects*

32. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
33. The parties have provided nine joint shopping invoices in Australia dated from December 2014 to November 2015, and one joint tour invoice in Vietnam. The applicant has provided evidence of a joint bank account opened on 3 July 2015. The parties stated that they used the joint account to pay bills and childcare payments and day to day living expenses. The parties told the Tribunal that they paid their bills in cash at the post office. The applicant said that he worked as a handyman and furniture removalist in Australia and was paid cash. He further stated that he gave all his wages earned to the sponsor except for \$100 per week for his living expenses.
34. The parties told the Tribunal that they have a term deposit in joint names in Vietnam Eximbank. The parties provided as evidence a balance sheet from Eximbank showing that there was VND1, 546,705,524 in the account and they would use that money to establish

themselves in Australia. The parties told the Tribunal that the sponsor's parents sold land in Vietnam and gave them the money to invest in their future together. The parties stated they renew the fixed term deposit every three months.

35. The parties provided one money transfer receipt which shows that AUD 2,000 has been sent from the sponsor to the applicant on 15 September 2016. While the evidence of a money transfer indirectly supports that the sponsor has assisted the applicant with some day-to-day expenses, the Tribunal does not consider that one money receipt supports a finding that the applicant and sponsor have now pooled their financial resources.
36. The parties stated that they shared the day-to-day living expenses when the sponsor visited the applicant in Vietnam. The parties had a sound knowledge of their financial resources, income, previous rental arrangements and past and possible future employment.
37. There is no evidence before the Tribunal that the parties have any joint liabilities or major assets such as real estate together. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other.
38. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and the applicant live in separate countries. The Tribunal places some weight on this aspect of the relationship.

39.

the household

Nature of

40. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
41. The Tribunal has considered the nature of the household. The Tribunal accepts there is a degree of difficulty in establishing a joint household when the parties live in separate countries at the present time. The parties provided evidence to the Tribunal of living together in Australia from April 2014 to December 2015.
42. The applicant and the sponsor provided shopping invoices in joint names dated from December 2014 to November 2015 for household items, whitegoods and furniture. The Tribunal notes that some of those purchases in joint names occurred when the applicant had left Australia and was residing in Vietnam. The Tribunal places little weight on the purchases made when the applicant was offshore. The parties also provided one joint electricity bill at an address in Bankstown, NSW and dated 1 December 2015. The Tribunal places some weight on the bill as evidence of a shared household.
43. The parties also provided evidence that indicates that the sponsor obtained a temporary household registration at the address of the applicant in Hai Phong city for a two-month period from 15 March 2016 to 15 May 2016. The parties also submitted one joint hotel bill from Nha Trang city dated 24 March 2016. They also provided hotel receipts for July 2017 in Vietnam, sightseeing tour receipts and movie tickets when the sponsor visited the applicant in Vietnam in 2017. The parties also provided evidence that indicates that the sponsor and her daughter obtained a temporary household registration at the address of the applicant in Hai Phong City for a six-month period from 11 January 2017 to 11 July 2017. The evidence suggests that the applicant and sponsor have spent a reasonable amount of time together and the Tribunal places some weight on this as evidence of a shared household.
44. The parties provided broadly consistent and detailed oral evidence of their activities and living arrangements when together in Vietnam and when living together in Australia and

sharing the household duties and responsibilities. The parties provided evidence of their love, support and care of their common child together and the sponsor's child to another relationship.

45. Based on the evidence presented by the parties, the Tribunal accepts that they live together and have established a joint household together when the sponsor visits the applicant in Vietnam. The Tribunal places some weight on this aspect of the relationship.

46. Social aspects

47. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
48. The parties have provided a selection of photos taken of themselves with each other, with friends and family and on different occasions in both Vietnam and Australia. The photos indicate that the applicant and the sponsor have undertaken some joint social activities, have been in the company of each other's friends and families and have travelled together. The parties also submitted photographs as evidence that they held a wedding party with friends at a restaurant in Australia on 18 October 2015. The Tribunal has given some weight to the submitted photographs as evidence of the social aspects of the claimed relationship. The parties provided statutory declarations from a number of friends attesting to their relationship giving convincing reasons as to why they believe the relationship between the applicant and sponsor is a genuine one.
49. Overall, the Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

50. Commitment

51. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
52. The applicant and the sponsor claim to have known each other since 2008 and were married on 18 October 2015. They have provided a marriage certificate issued in Australia on 18 October 2015. The Tribunal accepts that the applicant and the sponsor are lawfully married. To date, the relationship has lasted for a period exceeding three and a half years.
53. The parties claim that they have been in a long standing relationship and they have a child together. The parties stated that they have planned their long-term future together in Australia and if they were separated it would be traumatic for them both and cause the break- down of their family unit as it exists today. The parties stated that they could not live their lives separately and apart from each other. The child born to their relationship (Tiffany) currently resides with the applicant in Vietnam.
54. The parties' evidence is that they continue to be in a genuine and continuing relationship and there is a child to the relationship who is an Australian citizen. Although the Tribunal does not consider the claim of a common child to be automatic proof that the applicant and sponsor have been in an exclusive and ongoing relationship as spouses, the Tribunal places

significant weight on the fact the parties are the biological parents of the child. The parties provided evidence that they are the biological parents of the child on two occasions.

55. The applicant and the sponsor claim that they have been in regular communication via Facebook, Face Time and Viber since the applicant returned to Vietnam. The sponsor has returned to Vietnam to be with the applicant for significant periods of time. The Tribunal accepts that the parties have regularly remained in contact during times of separation and have established a household together.
56. The parties stated that they have AUD100, 000 in savings and they want to own and operate their own beautician store in Australia together. They further stated that will focus on their children's education, purchase their own home and live together as a family unit. The sponsor told the Tribunal that travelling to and from Vietnam and trying to manage and raise a family causes difficulty and hardship for all concerned.
57. The Tribunal accepts that the parties have a commitment to each other and to the care and support of their common child and the sponsor's child from a previous relationship. The parties presented oral evidence of continued daily contact during periods of separation and a sound knowledge of each other's family, living arrangements, health, employment and personal history.
58. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations.
59. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other as plausible, persuasive and genuine.
60. The Tribunal is satisfied the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship.
61. Having regard to the entirety of the circumstances, the Tribunal is satisfied the visa applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing and they do not live separately and apart on a permanent basis.

62. Findings

63. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
64. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
65. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18. Therefore the applicant meets cl.309.212 and cl.309.213.
66. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

67.

DECISION

68. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

69.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).